U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

File: A21 690 119 - Oakdale

Date: JUN 30 1999

In re: JAMES SANDERSON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: J. Todd Nesom, Esquire
Nesom Law Office
P.O. Drawer 1131
Oakdale, Louisiana 71464

ON BEHALF OF SERVICE: Richard J. Averwater
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility; cancellation of removal

The respondent is a native and citizen of Jamaica who entered the United States on February 28, 1976, without inspection. On March 7, 1980, his status was adjusted to that of a lawful permanent resident. On June 28, 1983, he was convicted in the Brampton, Ontario Court for the country of Canada for the offense of Possession of Narcotics for the Purposes of Trafficking in violation of section 4(2) of the Narcotics Control Act. On May 17, 1994, he was convicted in the 15th Judicial District Court for the State of Louisiana for the offense of Carnal Knowledge of a Juvenile in violation of LSA-R.S. 14:80. Based on these convictions, the Immigration Judge found the respondent to be removable as charged[1] and ineligible for the

[1]The Notice to Appear charged the respondent with being subject to removal as an aggravated felon under sections 101(a)(43)(A) (sexual abuse of minor) and 101(a)(43)(B) (drug-trafficking) of the Act, 8 U.S.C. §§ 1101(a)(43)(A) and 1101(a)(43)(B) (Exh. 1). On April 1, 1998, the service lodged an additional charge against the respondent, i.e., being subject to removal as an aggravated felon pursuant to section 101(a)(43)(F) (crime of violence) of the Act, 8 U.S.C. § 1101(a)(43)(F) (Exh. 2). The heading of the Immigration Judge's decision indicates that the respondent is charged with being an aggravated felon, but it only lists sections 101(a)(43)(B) and

(continued...)

forms of relief sought, i.e., a waiver under sections 212(c) or 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(c) and 1182(h), or cancellation of removal under section 240(A)(b) of the Act, 8 U.S.C. § 1229b(b). The appeal will be dismissed.

We agree with the Immigration Judge's decision finding the respondent to be subject to removal as charged based on his convictions. His June 28, 1983, drug-trafficking charge renders him an aggravated felon under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). We find that the documents in the record relating to this charge (Exh. 5) are adequate to establish removability under the Act, and we therefore reject the respondent's contention that the Service failed to establish that he is subject to removal based on the drug trafficking charge. See 8 C.F.R. § 3.41(d) ("Any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.") (emphasis added).

We also find that the respondent's May 17, 1994, conviction for the offense of Carnal Knowledge of a Juvenile in violation of LSA-R.S. 14:80 is an aggravated felony. The statute under which the respondent was convicted makes it a crime for a "person over the age of seventeen" to have "sexual intercourse," or "anal or oral sexual intercourse" with consent, with any person of the age of twelve years or more, but under the age of seventeen years when there is an age difference of greater than two years between the two persons and the victim is not the spouse of the offender.

Under section 101(a)(43)(F) of the Act, as amended by section 321(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat 3009 ("IIRIRA"), an aggravated felony is defined to include "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." The new definition of the term applies to convictions entered before, on, or after the date of enactment. Section 321(b) of the IIRIRA. "The term 'crime of violence' means . . . (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16.[2]

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[1](...continued)
101(a)(43)(F), and does not mention section 101(a)(43)(A) of the Act. The Immigration Judge's decision does not clearly state under which provisions the respondent was found to be an aggravated felon. Our decision will discuss each of these sections of the Act.

[2]The respondent argues that physical force is not an element of the crime for which he was convicted, i.e., carnal knowledge of a juvenile. However, it is clear that physical force need not be an element of the crime for it to be a crime of violence. All that is required is that the crime involve a substantial risk that physical force will be used. See 18 U.S.C. § 16(b); Matter of Magallanes, Interim Decision 3341, at (BIA 1998) (noting that in order to qualify as a crime (continued...)

We have previously reasoned that a common sense view of a sexual abuse law, in combination with the legal determination that children are generally incapable of consent, suggests that whenever an older person attempts to sexually touch a child under the age of consent, there is invariably a substantial risk that physical force will be wielded to ensure the child's compliance. See Matter of B-, Interim Decision 3270, at 4-5 (BIA 1996). Furthermore, the federal courts have consistently found crimes of sexual abuse of a child, child molestation, and statutory rape to be crimes of violence under section 18 U.S.C. § 16(b). Id., at 5. Because the respondent was significantly older than his minor victim, we conclude that the respondent was convicted of an offense which, by its nature, involved a substantial risk that physical force would be used against the person or property of another while committing the offense. See 18 U.S.C. § 16(b). Therefore, we find that this offense was an aggravated felony in that it was a crime of violence for which the term of imprisonment was at least 1 year. Section 101(a)(43)(F) of the Act.

We also find that the respondent's conviction for carnal knowledge of a juvenile constitutes the "sexual abuse of a minor," and is therefore also an aggravated felony under section 101(a)(43)(A) of the Act. Under the terms of the Louisiana statute set forth above, the offense described is essentially statutory rape.[3] Many scholars have defined statutory rape as "sexual abuse of a minor." See Lynne Henderson, Without Narrative: Child Sexual Abuse, 4 VA. J. SOC. POL'Y & L. 479, 481 (1997) (stating that "[b]y sexual abuse, I mean everything ranging from rape to statutory rape to oral and anal contact to genital touching . . ."). In addition, other states have reclassified statutory rape as "sexual abuse of a minor." See ALASKA STAT. §§ 11.41.434, 11.41.436, 11.41.438, 11.41.440 (West, WESTLAW current through 1998 2nd Spec. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 254 (West, WESTLAW current through end of 1997 2nd Spec. Sess.).

The strongest argument for finding that a Louisiana conviction for carnal knowledge of a juvenile constitutes "sexual abuse of a minor" arises from Louisiana law. It does not appear that Louisiana has created one specific offense called "sexual abuse of a minor." Instead, Louisiana categorizes four separate offenses under the heading of "Sexual Offenses Affecting Minors." See LA. REV. STAT. ANN. § 14:80 (West, WESTLAW current through 1998 1st Ex. Sess. and Reg. Sess. Acts) (defining carnal knowledge of a juvenile); LA REV. STAT. ANN. § 14:81 (West, WESTLAW current through 1998 1st Ex. Sess. And Reg. Sess. Acts) (defining indecent

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of violence under 18 U.S.C. § 16(b), it must be an offense for which the nature of the crime involves a substantial risk that physical force may be used against the person or property of another during the commission of the offense).

[3]As noted above, the Board has previously recognized the legal determination that children are generally incapable of consenting to the sexual advances of an adult. See Matter of B-, supra, at 4-5. Therefore, we reject any suggestion by the respondent that his conviction for carnal knowledge of a juvenile does not constitute the "sexual abuse of a minor" because he alleges that the victim consented to the crime.

behavior with a juvenile); LA REV. STAT. ANN. § 14:81.1 (West, WESTLAW current through 1998 1st Ex. Sess. and Reg. Sess. Acts) (defining pornography involving a juvenile); LA REV. STAT. ANN. § 14:81.2 (West, WESTLAW current through 1998 1st Ex. Sess. and Reg. Sess. Acts) (defining sexual molestation of a juvenile). Additionally, "sexual abuse" is defined in title 9, section 362 of the Louisiana Code (Post-Separation Family Violence Relief Act) as including the offense of carnal knowledge of a juvenile. See LA. REV. STAT. ANN. § 9:362(5) (West, WESTLAW current through 1998 1st Ex. Sess. and Reg. Sess. Acts) ("Sexual abuse' includes acts prohibited by [title 14, section 30 of the Louisiana Criminal Code].") As stated above, carnal knowledge of a juvenile is an offense categorized under "Sexual Offenses Affecting Minors." Therefore, applying Louisiana law, we conclude that the respondent's conviction for carnal knowledge of a juvenile constitutes the "sexual abuse of a minor" and is therefore an aggravated felony under section 101(a)(43)(A) of the Act.

We agree with the Immigration Judge's decision that the respondent is ineligible for a waiver of inadmissibility under section 212(c) of the Act. The respondent is in removal proceedings pursuant to a Notice to Appear issued on December 1, 1997. The removal proceedings provisions of the IIRIRA are applicable to aliens placed in immigration proceedings on or after April 1, 1997. One of the effects of the new legislation under IIRIRA is that the relief that existed under section 212(c) of the Act was repealed. Consequently, the respondent in the present case is unable to seek this form of relief because it is not available to aliens in removal proceedings.

Relief analogous to that formerly available under section 212(c) of the Act would be cancellation of removal under section 240A of the Act. However, the respondent is also ineligible for this form of relief. Section 240A(a)(3) of the Act provides that the Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien has not been convicted of any aggravated felony. Because the respondent's conviction falls within the definition of "aggravated felony," he is ineligible for cancellation of removal.

The respondent also seeks a waiver of inadmissibility pursuant to section 212(h) of the Act. The disposition of this issue is controlled by our decision in Matter of Yeung, Interim Decision 3297 (BIA 1996), where we held that under the amendments to section 212(h) by the IIRIRA, an alien who has been admitted to the United States as a lawful permanent resident and who has been convicted of an aggravated felony since the date of such admission is ineligible for a waiver. For these reasons, we find that the respondent is removable as charged and ineligible for any form of relief that he seeks.

ORDER: The appeal is dismissed.

Lori Scialabba

FOR THE BOARD